ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 30, 2011

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2011-04378

Dear Mr. Meitler:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412944 (TEA PIR Nos. 14560 and 14564).

The Texas Education Agency (the "agency") received two requests for proposals submitted in response to RFQ 701-11-005 for Internal Auditing Services and their rankings. You state the requested rankings have been released. Although you raise no exceptions to disclosure of the requested information, you state release of this information may implicate the proprietary interests of third parties. Thus, pursuant to section 552.305 of the Government Code, you notified Business & Financial Solutions; Clifton Gunderson, L.L.P.; ERGO Consulting Group Corporation; Holtzman Partners, L.L.P.; Monday N. Rufus, P.C.; R.A. Jones, P.L.L.C; Rupert & Associates, P.C. ("Rupert"); and Weaver & Tidwell, L.L.P. ("Weaver") of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Rupert and Weaver. We have considered the submitted comments and reviewed the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining third parties have submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Accordingly, none of the information pertaining to the remaining third parties may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims

exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the agency may not withhold any of the information at issue based on the proprietary interests of the remaining third parties.

We next note Rupert seeks only to withhold information the agency has not submitted to this office for review. Because the information Rupert seeks to withhold was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the agency. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, as Rupert does not seek to withhold any portion of the submitted information, we will not address its argument under section 552.110(b) of the Government Code.

Weaver raises section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

> any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six

trade secret factors.[1] RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. ORD 552. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Weaver contends portions of its proposal, including its audit approach and methodology, client list, and cost proposal, constitute trade secrets under section 552.110(a). Having considered Weaver's arguments and reviewed the information at issue, we find Weaver has established a *prima facie* case its methodology and portions of its client list, which we have marked, constitute trade secret information and must be withheld under section 552.110(a). We note, however, Weaver has published the identity of one of its clients on its website. Thus, Weaver has failed to demonstrate the information it has published on its website is a trade secret. We also note pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, we conclude Weaver has failed to demonstrate any portion of its remaining information constitutes a trade secret, and none of Weaver's remaining information may be withheld under section 552.110(a).

We also find Weaver has demonstrated the release of portions of its cost proposal would result in substantial competitive harm. Accordingly, the agency must withhold the information we marked under section 552.110(b). We further note, as previously stated,

---

[1]The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of the company; (2) the extent to which it is known by employees and others involved in the company's business; (3) the extent of measures taken by the company to guard the secrecy of the information; (4) the value of the information to the company and its competitors; (5) the amount of effort or money expended by the company in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2.

Weaver has made the identity of one of its clients publicly available on its website. Because Weaver has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. Upon review of the remaining arguments, we find Weaver has failed to demonstrate that release of any of the remaining information would cause it substantial competitive harm. *See* ORD 661. Further, we note information pertaining to employee qualifications is not typically excepted from disclosure under section 552.110(b). *See* ORD 319 (finding information relating to organization and personnel, market studies, professional references, qualifications, and experience not ordinarily excepted under section 552.110). Consequently, none of the remaining information may be withheld under section 552.110(b).

We note some of the information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the agency must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 412944

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: E. Jaye Stepp
Rupert & Associates, PC
10616 Manchaca Road
Austin, Texas 78748
(w/o enclosures)

Ms. Robyn A. Jones
R.A. Jones, PLLC
1000 Heritage Center
Austin, Texas 78664
(w/o enclosures)

Monday Rufus
Monday N. Rufus, P.C.
608 Morrow Street, Suite 101
Austin, Texas 78752
(w/o enclosures)

Mr. Frank N. Vito
Clifton Gunderson LLP
9600 North MoPac Expressway
Austin, Texas 78759
(w/o enclosures)

Ms. Janet Sobey Bubert
Brackett & Ellis P.C.
100 Main Street
Fort Worth, Texas 76102-3090
(w/o enclosures)

Mr. John Moellenberg
Hotzman Partners, LLp
1710 West 6th Street
Austin, Texas 78703
(w/o enclosures)

Mr. Frank N. Vito
Clifton Gunderson LLP
9600 North MoPac Expressway
Austin, Texas 78759
(w/o enclosures)